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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

[redacted] ///

OLIVER SMITH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Oliver Smith, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-captioned case on April 8, 1968.

Citations to Opinions Below

There was no opinion rendered by the Court of Appeals. The judgment of the Court of Appeals is printed as Appendix A hereto. Two motions were made in the District Court for a new trial; (1) that such a new trial was required in the interest of justice and (2) on the ground of newly discovered evidence, respectively. The memorandum decision endorsed on the first motion is printed as Appendix B hereto, and the opinion rendered on the second motion is printed as Appendix C hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on April 8, 1968. The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254(1).

Questions Presented

(1) Should a judgment of conviction and sentence be permitted to stand, and a defendant deprived of his liberty for a period of ten years, for merely technical, non-jurisdictional reasons, when the weight of the proof presented to the courts below, accumulated piecemeal during the trial and in two motions for a new trial, point overwhelmingly to the innocence of the said defendant?

(2) Is criminal judicial procedure a sacred ritual, no part of which can be omitted without breaking the charm, or is it the function of the courts concerned with criminal jurisprudence, in the final analysis, to dispense justice?

(3) Is a defendant's deprivation of a fair trial by reason of the incompetency of counsel inexorably incurable solely for the reason that counsel was privately engaged?

Statutes Involved

Title 21, United States Code, § 173, provides:

> § 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.—*
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for

medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forefeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Title 21, United States Code, § 174, provides:

§ 174. *Same; penalty; evidence.*—

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of

any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Rule Involved

Federal Rules of Criminal Procedure, Rule 33.

Rule 33. New Trial. The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. As amended Feb. 28, 1966, eff. July 1, 1966.

Statement

The prosecution of the petitioner, Oliver Smith, consisted of four segments.

The first, of course, was the indictment. The second was the trial. The third was a motion for a new trial sought in the interests of justice. The fourth and last was a second motion for a new trial, the basis therefor being what petitioner claimed to be newly discovered evidence.

The trial resulted in a conviction, and the two motions for a new trial were denied.

(a) The indictment.

The petitioner and one Raymond Overbey were jointly indicted under three counts, charging them with violations of §§ 173 and 174 of Title 21, United States Code. The first two counts were substantive in nature, and the third count sounded in conspiracy. The first count involved 48 grams of heroin, and the second count involved 388 grams of heroin.

(b) The trial.

The trial of the defendants was scheduled to be held on June 21, 1967. The defendant Overbey failed to appear, whereupon the trial judge adjourned the matter until the next day, June 22nd, to enable counsel to find his missing client. On June 22nd, Overbey again failed to appear and he was declared a fugitive. The trial was severed as to him, and the defendant was directed to proceed. At the commencement of the trial, Smith, on the advice of counsel, elected to be tried by the judge without a jury.

Smith was represented by private counsel of his own choosing. He had available to him affirmative proof of great substance. Firstly, he had two witnesses, the effect of whose testimony would have negated even the possibility

that Smith was involved in the crime. Secondly, the absconding defendant, Overbey, had made clear that he would testify on the trial and that his recital of the facts would exonerate Smith completely. Despite the latter, Smith's counsel neither sought nor received an adjournment of the trial. With respect to the former, which comprised only part of the available affirmative proof, counsel chose to rest his client's case on the direct case presented by the government. He offered no witnesses and no proof.

As appears hereafter, the acts constituting the crimes took place between 4:00 P.M. and 7:30 P.M. on January 4, 1967. Smith's participation was said to have taken place between 5:00 P.M. and 7:15 P.M. on that day on a particular Harlem street corner, namely 120th Street and Eighth Avenue, in the County and City of New York.

Lena Sessoms, a nurse's aid, and Virginia Donald, a graduate registered nurse in the employ of the City of New York, both being persons of impeccable reputation and complete rectitude, were prepared to testify that, at the very time when it was said that Smith was busy committing crimes at 120th Street and Eighth Avenue, in the County of New York, he was at home at 1590 Undercliff Avenue, in the County of Bronx, some miles away.

Moreover, Smith had every reason to expect that, at the trial, his co-defendant Overbey would testify to facts whose net effect would be the total exoneration of Smith. On the day of trial, June 22nd, neither the government nor Smith had any inkling of Overbey's whereabouts or where he might be found. It was only some time after the trial that it was established that, prior to June 21st, Overbey had fled his usual Harlem haunts and had taken refuge in the hustle and bustle of Times Square, New York City. It was only after Overbey had been arrested by the New York City police on the totally unrelated charge of disorderly conduct on July 4th, and sent to the New York City Penitentiary to spend some 37 days, that the government became aware

of his whereabouts. It was much later, on August 11th to be exact, that the defendant Smith first learned where Overby might be found.

(c) The government's proof.

Five agents of the Federal Bureau of Narcotics were involved in the operations which culminated in the commission of the crimes and the apprehension of the defendants. Only four of them testified on the trial, however.

Agent Cook testified that, with the aid of an informer, by pre-arrangement, he met Overbey in a Harlem cocktail lounge, where they had a talk. That was at 4:00 P.M. on January 4th. They left the lounge at 4:30 P.M. and rode in informant's car to 121st Street and St. Nicholas Avenue, in Harlem, where Overbey left them, to return in 15 minutes to resume the conversation. Again Overbey left and returned at 5:45 P.M. At this time, he turned over to Agent Cook a package containing 48 grams of heroin, in return for which Agent Cook gave Overbey $800 in official advanced government funds. Overbey again left the agent and the informer and returned at 7:15 P.M. He then departed again, returning at about 7:30 P.M. with a package containing 388 grams of heroin which he turned over to Agent Cook. He was arrested on the spot by Agent Cook.

Agent O'Neill's testimony concerned only the official advanced funds. Although Agent Selvaggi later testified that Agent O'Neill was on the scene when Selvaggi was surveilling Smith, O'Neill was not asked one question about Smith or his supposed actions on the scene.

Agent Dunne's participation was confined to participating in the arrest of Smith six days after the date of the crime. He testified that he and Agent Selvaggi arrested Smith in front of 1590 Undercliff Avenue, Smith's home, and that a search of Smith revealed $137 of which two $20 bills matched numbers on the official advanced funds list.

Agent Rossi, whose presence on the corner of Eighth Avenue and 120th Street, at the time Smith was said to be there, was vouched for by Agent Selvaggi, did not even appear at the trial or attempt to testify in support of Selvaggi's testimony.

Only Agent Selvaggi, concerning whom Smith wrote to the trial judge, tied petitioner in with the events of January 4th. He swore he saw Smith with Overbey on the corner of Eighth Avenue and 120th Street at 5:00 P.M. engaged in conversation, and again at 7:00 P.M. Then, at about 7:15 P.M., he said he saw Smith, from a distance of no less than 25 feet, pass to Overbey a transparent bag containing white powder. This later turned out to be 388 grams of heroin. No attempt was made to arrest Smith on the scene although he arrived and left on foot. It was not until six days later that Agents Dunne and Selvaggi accosted Smith leaving his home in broad daylight that they arrested him. Not even Selvaggi testified that any money passed from Overbey to Smith.

The two $20 bills said to have been found on Smith at the time of his arrest was received in evidence over the objection of Smith's counsel.

Agent Selvaggi testified that he was certain that it was he who made out the official daily report late in the evening of January 4th. When that report was called for on the trial as part of the 3500 documents, only Selvaggi's grand jury testimony and two reports made on January 16th were produced. There was a sound reason for this withholding of the January 4th report for, when it was produced in response to a demand on the argument of the second motion for a new trial, on October 10th, it was destructive of Selvaggi's entire testimony and it fortified Smith's claim that Selvaggi had framed him. The January 4th report, which logged all activities until 11:00 P.M. on January 4th, mentioned Overbey and his arrest, mentioned the amount of narcotics seized, but was wholly silent

as to Smith. When this report was produced at the argument of the appeal in the Court of Appeals, it was shrugged off as being nothing more than a "time sheet". The production of the report on the appeal was pursuant to a direction of the Chief Judge made some 4 days before the argument. The astounding interpretation of this official secret government document as being a time sheet, despite its clear delineation of the surveillance and arrest of Overbey, defies all understanding. Had that January 4th report been turned over to Smith's counsel at the trial, as he had requested, it is interesting to speculate as to what reasons would have been offered to justify Smith's name not being on it.

(d) First motion for a new trial.

On the evening of June 22nd, the day of his conviction, while lodged in Federal Detention Headquarters, Smith wrote a letter to the trial judge, protesting his innocence, castigating the perfidy of Selvaggi, and imploring the judge to "investigate, investigate!" This letter is a matter of government record.

Petitioner did not engage new counsel until July 5th, some 13 days after his conviction, and six days beyond the seven days within which a motion for a new trial in the interests of justice might be entertained. It was then that petitioner gave counsel the facts of his defense, and it was shortly thereafter that he produced the two disinterested witnesses who had been ready to testify on the trial. Briefly, Lena Sessoms, who had been engaged to baby-sit for Mrs. Smith while she was to attend a theatrical performance that evening, phoned the Smith residence at 7:00 P. M. to extend her regrets and cancel her baby-sitting engagement. Smith himself answered the phone when it rang. She had known Smith for some long time and knew his voice both in person and on the telephone. Virginia Donald, who did attend the theatre with Mrs. Smith that night, phoned at 6:00 o'clock to alert Mrs.

Smith to be in front of her home at 7:00 so that Miss Donald might pick her up in a car. When the phone at the Smith apartment was picked up, it was Smith himself who answered it.

Smith's counsel sought to treat the Smith letter as a motion for a new trial. Precedent existed therefor in other circuits. See: *United States* v. *Ramsey* (USDC Mass. 1962), 202 Fed. Supp. 493; *Reid* v. *United States* (5th Circuit), 149 F. 2d 334. When the motion was denied in a memorandum endorsed on the moving papers, precedent was wholly ignored and the motion was held to be untimely. The theory of the petitioner was that the affidavits which were submitted on the motion constituted nothing other than supplementary and buttressing matter. Moreover, said the trial judge, he was not impressed by the affidavits. No hearing was granted and, in fact, no judicial or prosecuting official ever once exhibited the slightest curiosity as to the identity or background of these "non-person" affiants. Yet, if their depositions were true, it would have made it physically impossible for Smith to have been at 1590 Undercliff Avenue in the Bronx and at Eighth Avenue, County of New York at one and the same time, 7:00 P. M. on January 4th!

(e) Second motion for a new trial.

When the petitioner learned for the first time on August 11th that Overbey had been re-taken into custody, counsel for Smith, with the consent of Overbey's attorney, procured from Overbey an affidavit which not only exonerated Smith, but detailed Overbey's every move on January 4th and named the person from whom and place where he had obtained the narcotics. The affidavit set forth the whole of Overbey's criminal record. On the basis of that very affidavit, the trial court granted Smith a hearing on his motion. Overbey was the principal witness, and his testimony was so logical, clear and detailed, unshaken by cross-examination, that it should have been thoroughly con-

vincing. He testified that, when he went into hiding, his whereabouts were unknown to any person to whom he was known.

The trial judge denied the motion with an opinion, hereto annexed, in which he found (1) that Smith had made no attempt to seek an adjournment of the trial for the purpose of locating Overbey; (2) that he had made no showing of trying to locate Overbey between June 21st and June 22nd; and (3) that, in any event, he could not give credence to a witness with such a criminal record, even though the criminal record occupied a prominent part of the affidavit which had inspired the hearing. Moreover, said the opinion, the evidence was not newly discovered and, at best, could be deemed to be only newly available, giving rise to a legal nuance of such subtlety as to defy detection.

Taken in sum, the initial weakness of the government's case, the affidavits of the two disinterested and unassailable witnesses, and, finally, Smith's total exculpation by Overbey, the proof of the defendant's innocence assumes formidable proportions. It cannot be gainsaid that, had all of the proof been available and offered at the trial, even the most intransigent of judges would have been required to find the defendant not guilty. However, although ultimately the trial judge had all of this material presented to him, piecemeal admittedly, he remained unshaken in his conviction of the defendant's guilt. Similarly, the Court of Appeals was so little impressed, even with the damning daily report of January 4th, brought to the argument of the appeal at the instance of the Court itself, that it affirmed the judgment spontaneously and from the bench, without opinion.

The conclusion remains inescapable that, willy a nilly, a guiltless man sits imprisoned at Atlanta, doomed to give ten long years behind prison walls, in expiation of a crime he did not commit.

Reasons for Granting the Writ

Viewed from the history of certiorari in this Court, petitioner can offer no acceptable reason why he is entitled to the writ. Strictly speaking, he can adopt none of the grounds set forth in Rule 19 of the Rules of this Court. His case was reasonably fairly conducted, whatever the legal error may have been. The decisions in the courts below are not in substantial conflict with the decisions in other circuits. Nor are the decisions seemingly in conflict with decisions in this Court. There has been no departure from the usual and accepted course of judicial proceedings so as to require the supervision of this Court.

It would seem to follow, therefore, that this petition represents an exercise in futility.

But one nagging question presents itself, namely, that the petitioner has fully demonstrated his innocence of the crimes for which he stands convicted, although admittedly this was accomplished in bits and pieces and not in accordance with accepted practices. If, therefore, he be innocent, must he languish in prison because procedural impediments bar his release? If that be the case, then the machinery of justice is deficient. It has become lost in a labyrinth of procedural niceties. Theoretically, judicial procedures are but the means of arriving at the meat and substance. But procedures of late have loomed so large and have assumed such important proportions, that all too often those very procedures have become the goal rather than the means to an end, to wit: the doing of justice. It would seem, therefore, that the petitioner has been wrecked on the shoals of procedural protocol.

Such a nightmarish result does violence to the very concept of justice and raises serious doubts as to the value of our courts and rules as they are presently constituted. If that be the case, and a just result is made impossible

by procedural roadblocks, then the whole basic concept of our courts and the administration of justice needs a quick and thorough overhaul.

This Court of last resort is the petitioner's Court of first resort. Only this Court can supply the solution to petitioner's dilemma. Only this Court possesses the power necessary to cut a swath through the procedural maze right to the heart of the matter.

The way is pointed in an observation made by the late and revered Judge Learned Hand:

> "When the very merits of the case are clear; when only one result can honestly emerge; and when the jury has in fact been satisfied, we no longer look upon criminal procedure as a sacred ritual, no part of which can be omitted without breaking the charm." *United States* v. *Brown*, 79 F. 2d 321, 326 (2d Cir. 1935).

Oliver Smith comes armed, not with an imposing array of judicial precedent, but only with the cloak of innocence. If no way be found to achieve the justice which this case requires, then he has almost a decade to ponder in his prison cell on the vagaries of fate.

Respectfully submitted,

PHILIP BLANK,
Attorney for Petitioner.

SAMUEL W. GILMAN,
of Counsel.

APPENDIX A

Order of Affirmance by Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of April, one thousand nine hundred and sixty-eight.

Present: HON. J. EDWARD LUMBARD, Chief Judge.
HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND OVERBEY,
Defendant,

OLIVER SMITH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

Order Denying Motion for a New Trial.

This motion for a new trial is denied on two grounds: first, that it is untimely, and second, that even if timely made the papers do not justify the relief sought. So ordered. Aug. 7, 1967.

CHARLES M. METZNER,
U. S. D. J.

P-E S

APPENDIX C

Opinion Denying Second Motion for a New Trial.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Cr. 112

#34293

UNITED STATES OF AMERICA,

against

OLIVER SMITH,

Defendant.

METZNER, D. J:

Oliver Smith and Raymond Overbey had been named as defendants in each of three counts in an indictment. Counts 1 and 2 were substantive counts against both defendants, charging violations of 21 U.S.C. §§ 173 and 174. Count 3 charged a conspiracy by both defendants with regard to both transactions. The case came on for trial on June 21, 1967. Overbey failed to appear and the case was adjourned to the following day, with directions to Overbey's counsel to find him, and also to notify the bonding company. On June 22 Overby again failed to appear. His counsel did not know of his whereabouts and the bondsman had been unable to find him. The court declared a forfeiture of Overbey's bond and issued a bench warrant for his arrest. The indictment was severed as to Overbey, Smith waived a jury, and the trial went forward.

Appendix C.

At the end of the Government's case, the court granted Smith's motion to dismiss count 1 of the indictment, but denied his motion to dismiss counts 2 and 3. Smith rested on the Government's case and the court found him guilty as charged on counts 2 and 3. On August 7, 1967, after denying a motion for a new trial, the court imposed the mandatory minimum sentence of 10 years on count 2. A 5-year sentence was imposed on count 3, to run concurrently with the sentence imposed on count 2.

On August 11, 1967 Overbey was turned over to the federal authorities by the New York police. He had been incarcerated on Rikers Island since July 4 on a disorderly conduct charge. On August 14 Overbey appeared for pleading to an indictment for bail jumping. His lawyer advised him to plead guilty to the narcotics indictment at the same time, but he refused. He said he would plead guilty only to the substantive counts in that indictment and not to the conspiracy count involving Smith. He maintained this position when the matter again appeared on the calendar on August 17. On August 18 it appears that the Government would accept such a plea and it was entered. At the time of changing his plea, he stated on the record that he did not wish to implicate defendant Smith because Smith was completely innocent of the charge. Overbey was subsequently sentenced to a mandatory 10 years on counts 1 and 2, to run concurrently.

On September 18, 1967 Smith made this second motion for a new trial on the grounds that an affidavit by Overbey that Smith was innocent constituted newly discovered evidence. After reviewing the papers, the court set the matter down for hearing. On the hearing Overbey testified that he alone was involved in the two sales that were made on January 4, 1967, that he did not obtain the narcotics from Smith, but obtained them from a man named Bernie Robinson, who lived one flight up in the apartment house

at 212 St. Nicholas Avenue. Overbey further testified that he never saw Smith at any time during that day, nor did he speak to him.

It appears that Overbey's release on bail was effected by Smith through a bonding company. This occurred on January 12, 1967, 2 days after Smith himself was named in a complaint and arrested, and the day after Smith was released on bail. Overbey testified that during February, March and April he had numerous conversations with his attorney to the effect that he alone was involved in the crime, that the narcotics came from Robinson and not Smith, that he was going to plead guilty, and that he was going to testify on Smith's behalf.

Smith knew all of these facts for several months prior to trial. He knew Overbey and Overbey's girl friend, and knew that they were living together in the Bronx. In fact, Overbey's girl friend, the only other witness on Smith's behalf on this hearing, testified that Smith was the first one she turned to for help when she learned on January 5 that Overbey had been arrested. Neither the Government nor Overbey's lawyer knew of her whereabouts. Despite all this, there was no showing on this hearing of any attempts made by Smith to find Overbey on June 21 after Overbey failed to appear for trial. When Overbey was asked as to his whereabouts in June of 1967, he said he was hanging around the Times Square area for 2 or 3 weeks and had never gone back to Harlem.

When the case was called again on June 22, Smith did not object to the severance and proceeded to trial. He made no effort to obtain an adjournment of the trial to enable him to locate the only one aside from himself who could possibly exculpate him. And this man had been released on bail arranged for by Smith for the sole purpose of helping Smith in his defense. Between Overbey's first appearance before the commissioner and the date set for

trial, Overbey, on a number of occasions, had voluntarily appeared in court.

It is obvious from a recitation of the factual material that this evidence is not newly discovered. At best it is newly available evidence.

The defendant has the burden of proof on this motion and he must show that while the existence of the evidence may have been known to him before the trial, the failure to produce it was not due to lack of diligence on his part. He must also show that the evidence is so material and credible that it would probably produce a different verdict if a new trial were granted.

Defendant fails on both requirements. As to the first requirement, I have already reviewed the evidence showing that Smith neither made any attempt to find Overbey nor requested an adjournment for that purpose. As to the second requirement, a new trial would only produce a witness who would contradict the testimony of the agent. In view of Overbey's record of five prior convictions plus the implausibility of the story given on this hearing, it could not be said that his testimony would probably produce a judgment of acquittal.

Motion denied. So ordered.

Dated: New York, N. Y., December 28, 1967.

CHARLES M. METZNER,
U. S. D. J.

[redacted]

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810-550—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 111

OLIVER SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. C) is not yet reported. The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1968. On May 8, 1968, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to May 22, 1968, and on May 20, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial of petitioner's motion for a new trial based on alleged newly discovered evidence was proper.

STATEMENT

1. Petitioner and one Overbey were jointly charged in a three-count indictment with narcotics offenses. Counts 1 and 2 charged substantive violations of 21 U.S.C. 173 and 174. Count 3 charged a conspiracy to commit those offenses. When the case came on for trial on June 21, 1967, Overbey, who was at liberty on bail, did not appear. The trial judge, *sua sponte*, granted a one-day continuance and instructed Overbey's lawyer to try to find him and to notify the bonding company. On the following day, Overbey again failed to appear. His counsel did not know where he was. On motion of the prosecutor, the case was severed as to Overbey. Petitioner waived a jury, and trial was had to the court. At the conclusion of the government's case, the court dismissed count 1 for lack of sufficient evidence. The defense introduced no testimony. Petitioner was found guilty on counts 2 and 3. On August 7, 1967, he was sentenced, as a second narcotics offender, to the mandatory minimum term of ten years' imprisonment on count 2 with a concurrent sentence of five years' imprisonment on count 3.

The government's evidence consisted principally of the testimony of three federal narcotics agents—Cook, Selvaggi, and Dunne. Cook testified that on January 4, 1967, while acting in an undercover capacity,

he had a conversation with Overbey and an informant at 4:00 p.m. in a lounge in New York City. At about 4:30 p.m. the men drove to 121st St. and St. Nicholas Avenue. Overbey left and then returned about fifteen minutes later. After a conversation, Overbey departed and Cook and the informant drove away. They returned at about 5:45 p.m. to the same intersection. Overbey got in the car and handed Cook a tinfoil package which was shown to contain 48 grams of heroin (R. 50–51). Cook gave Overbey $800 in official funds, the serial numbers of which had been recorded (R. 5–10).[1]

At about 7:15 p.m., Cook and the informant met Overbey at the same corner. After a brief conversation, Overbey left. He returned after several minutes and handed Cook a plastic bag containing a white powder shown to contain 388 grams of heroin (R. 50–51). Overbey was then arrested (R. 11–12). A search disclosed that he was carrying no other package.

Selvaggi testified that he saw Overbey, after meeting Cook and the informant at 4:30 p.m., walk to the corner of 120th St. and 8th Avenue. Overbey there met petitioner and talked with him (R. 15). At about 7:00 p.m., Selvaggi observed petitioner again talking with Overbey on 120th St. and 8th Avenue. Overbey walked to the car in which agent Cook and the informant were sitting and then returned to petitioner. After a few minutes' discussion, petitioner removed a transparent package containing white powder from his

[1] "R." refers to the record in the court below, lodged with the Clerk of this Court.

coat pocket and gave it to Overbey (R. 17–18, 34–35, 56).

Petitioner was arrested on January 10, 1967 (R. 24–25).[2] Both Dunne and Selvaggi testified that at the time of his arrest petitioner was searched and was found to be carrying $137, of which two twenty-dollar bills were revealed by an examination to have been among the $800 paid by Cook to Overbey (R. 26, 47).[3]

2. Immediately following his conviction, petitioner, who had been represented by retained counsel (Mr. Siegel) at the trial, wrote a letter to the trial judge protesting his innocence and urging the court to investigate (R. 124–126).

On July 5, 1967, petitioner retained new counsel, Mr. Gilman. On July 20, 1967, Mr. Gilman filed a motion for a new trial on behalf of petitioner under Rule 33, F.R. Crim. P. Appended were affidavits by himself (R. 88–89), one Lena Sessoms (R. 100–103), one Virginia Donald (R. 104–107), petitioner's wife (R. 118–123), and petitioner (R. 108–117). The motion was not made on grounds of newly discovered evidence (R. 227–228). Counsel recognized that Rule 33 provides that motions for a new trial not based on newly discovered evidence "shall be made within 7 days after verdict or finding of guilty" (see Pet. 4 for text of Rule) and that the district court has no jurisdiction to consider untimely motions. *United*

[2] Selvaggi testified that he believed an agent had tried to follow petitioner after he had transferred the 388-gram package to Overbey, but had lost him (R. 33, 36).

[3] This $800 sale was the subject of the charge in count 1 of the indictment, dismissed as to petitioner by the court.

States v. *Smith*, 331 U.S. 469; see *United States* v. *Robinson*, 361 U.S. 220, 225. He nevertheless argued that petitioner's letter written immediately after his conviction should be deemed a sufficient motion, to which the affidavits were merely supplemental.

On August 7, 1967, the district judge denied the motion on the grounds (Pet. App. B):

> first, that it is untimely, and second, that even if timely made the papers do not justify the relief sought.

The affidavits, which were designed to establish an alibi, showed, in sum, the following.[4] On the evening of January 4, 1967, the date of the narcotics transactions, Mrs. Smith (petitioner's wife) attended a Broadway show with Virginia Donald. Mrs. Sessoms had agreed to baby-sit for the Smiths that night. She stated that at 5:00 p.m. she telephoned the Smith residence to advise that she would be there at about 7:00 or 7:30 p.m. and Mrs. Smith answered the telephone. At 7:00 p.m. when Mrs. Sessoms called back to say that she could not baby-sit, petitioner answered the telephone. Virginia Donald's affidavit was to the effect that she telephoned the Smith residence at 6:00 p.m. to tell Mrs. Smith to meet her outside at 7:30 p.m. to go to the theatre and that petitioner answered the telephone.[5] Mrs. Smith stated that Mrs.

[4] While not directly pertinent to the proceeding here—a motion for a new trial based on alleged newly discovered evidence of Overbey—we set forth in some detail the prior affidavits and the government's response thereto because of their bearing on petitioner's claim that he was not the man who supplied Overbey with narcotics on January 4, 1967.

[5] Both Mrs. Donald and Mrs. Sessoms stated that they recognized petitioner's voice.

Sessoms had telephoned twice on January 4, 1967—at 6:00 p.m. and just before 7:30 p.m.—and that petitioner answered on both occasions. She said Virginia Donald called at about 7:00 p.m. and spoke first to petitioner.

Petitioner confirmed that he was home at the critical times on January 4, 1967. He stated that his witnesses were "ready to testify" (R. 110) at the trial but that Mr. Siegel (whom he credited as a lawyer of considerable reputation at the criminal bar whose skill "even now" he had no reason to doubt (R. 109)) apparently determined not to call them in the belief that the government had not made out a case. Petitioner alleged that, in making that decision, Mr. Siegel had taken an unwarranted risk and had not afforded him adequate representation (R. 116). Petitioner also stated that, at the time of his arrest, he had $240 on his person which the agents took, examined, and then returned (R. 115). He alleged that the government's trial testimony was a "fantastic concoction", and that he was made the "patsy" for this offense, presumably because of his prior narcotics record.

In response, the government pointed out the numerous inconsistencies between the alibi affidavits of Mrs. Sessoms, Mrs. Donald, and Mrs. Smith. In addition, the prosecutor called the court's attention to the fact that, following his first narcotics conviction in 1960, petitioner similarly had immediately written letters to the trial judge protesting his innocence, and asserting that the government agents who testified against him at the trial had lied (R. 136–137).

3. On September 18, 1967, the instant motion for a new trial, based on alleged newly discovered evidence of Overbey, was filed. Attached was an affidavit of Overbey (R. 186–191), who had been re-taken into custody, to the effect that petitioner had been "framed" and that he (Overbey) had obtained the narcotics transferred on January 4, 1967, from one Bernie Robinson.[6] The trial judge ordered a hearing on the basis of Overbey's allegations.

At the hearing held on November 2, 1967,[7] Overbey repeated his assertion that he had not obtained narcotics from petitioner (R. 293, 298, 302–303, 312). He testified that, at the time of trial, he was in the area of Times Square, where he remained for a period of two or three weeks. He had been arrested by New York City police on July 4, 1967, for disorderly conduct and had been turned over to federal authorities on August 11, after spending more than a month in a New York penitentiary (see R. 284–286; Pet. App. C, 17). Overbey said he had known petitioner for about fifteen years and that they had been in prison together (R. 330). Petitioner had arranged his bail on the instant charge (R. 331).[8] After the indictment,

[6] Also appended to the motion was an affidavit of Mr. Gilman (R. 176–185) and another of petitioner, similar in content to the affidavits appended to the prior motion (R. 167–175).

[7] Meanwhile, in August, Overbey had refused to plead guilty to count 3 of the indictment against him for the stated reason that it charged a conspiracy with petitioner, who was not involved. He later pleaded guilty to counts 1 and 2 only, and received the mandatory minimum sentence, as a second narcotics offender, of ten years' imprisonment on each count, the sentences to run concurrently (R. 199, 253, 257–260).

[8] Petitioner had admitted in his letter of June 22 to the trial judge that he had arranged bail for Overbey (R. 125).

but before the trial, Overbey had told petitioner that Bernie Robinson was the person from whom he had obtained the narcotics (R. 333–334). During February, March and April of 1967, Overbey was brought to the courthouse and had several conversations with his attorney to the effect that he alone was involved. Present on many of these occasions were petitioner and his attorney, Mr. Siegel (R. 316–317).

Overbey testified that he had a record of five convictions, including three felonies (R. 281–284).

Lenora Porter, Overbey's girl friend, confirmed that petitioner had supplied Overbey's bail. She indicated that she knew petitioner and implied that he was the first person to whom she turned after arrest (R. 340–341, 349).

Mr. Gilbert, Overbey's trial counsel, testified that Overbey had always told him that petitioner was not involved in this case. He stated that he knew Mr. Siegel from prior court cases and communicated quite freely with him (R. 361, 368–369).

ARGUMENT

The record fully supports the decision of the district court denying the second motion for a new trial. As the district judge held (Pet. App. C, 19), petitioner failed to establish either that the alleged new evidence by Overbey was "newly discovered" or that it would probably have produced a different result if a new trial were granted. As to the first point, petitioner made no effort to try to locate Overbey or to seek a continuance when his absence was first learned, although petitioner was his long-time ac-

quaintance, knew his girl friend, and had been instrumental in securing bail for Overbey. While it is impossible to state whether such efforts would have been successful, petitioner introduced no evidence to show that they would not, and it was his burden to prove that the unavailability of Overbey at the trial was not due to lack of diligence on petitioner's part.[9] *E.g., United States* v. *Edwards,* 366 F.2d 853, 874 (C.A. 2), certiorari denied *sub nom.* 386 U.S. 908, 919. The trial judge also found that Overbey's evidence would not likely produce a different result in the event of a new trial. In view of Overbey's five prior convictions and the weight of the countervailing evidence, that finding is not unreasonable. Moreover, after observing Overbey testify, the court specifically found that his story was "implausible" (Pet. App. C, 19). Such a determination is entitled to great weight. *United States* v. *Johnson,* 327 U.S. 106.

Petitioner argues that, notwithstanding the foregoing impediments to the relief he seeks, this Court should grant him a new trial because he appears before it garbed in "the cloak of innocence" (Pet. 13), "a guiltless man * * * imprisoned at Atlanta" (Pet. 11). The evidence, however, does not bear out these assertions.

The court observed and credited the testimony of narcotics agent Selvaggi, identifying petitioner as the person from whom Overbey received a package of

[9] It should be noted that nowhere did Overbey or his lawyer affirmatively indicate that Overbey was prepared to testify in support of petitioner at the time of the trial. This necessary link in the chain of petitioner's argument is left to inference.

heroin subsequently transferred to agent Cook. Petitioner has offered no plausible reason, nor are we aware of any, why Selvaggi's testimony should not be credited. The affidavits of petitioner's alibi affiants are marked by inconsistencies as to the times when telephone calls, allegedly answered by petitioner at home, were made. This uncertainty is critical since petitioner could very well have been home both shortly before, and shortly after, the transfer of the narcotics to Overbey. Finally, the evidence of Overbey, as the district judge found, is not entitled to credence. In short, there clearly is not, on this record, the showing of innocence necessary to warrant the extraordinary overturning of a finding of guilt reached on sufficient evidence and by lawful and proper procedures.[10]

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[10] Petitioner attempts to draw an inference of innocence from a daily report of agent Selvaggi on January 4, 1967, which does not allude to petitioner (Pet. 8–9). The report is not a producible "statement" under 18 U.S.C. 3500 and merely purports to list the agent's whereabouts at various times for purposes of showing expenses incurred. The court of appeals, which considered the report, was plainly correct in treating it as of no significance on the issue of petitioner's guilt. We are lodging the report with the Clerk of this Court, along with a copy of agent Selvaggi's report dated January 16, 1967, which does inculpate petitioner and which was furnished to petitioner's counsel at trial in compliance with 18 U.S.C. 3500.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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